UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

PING RUAN, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 99B00061
UNITED STATES NAVY, Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

(*February 8, 2000*)

I. INTRODUCTION

On August 27, 1999, Ping Ruan (Complainant) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that the United States Navy (Respondent) had committed immigration-related unfair employment practices. On January 19, 2000, Respondent filed a Motion to Dismiss. I conclude that the Complaint must be DISMISSED on the ground that the sovereign immunity of the United States deprives OCAHO of subject-matter jurisdiction to adjudicate actions against Respondent. Moreover, aside from the jurisdictional bar, I conclude that Complainant's intentional defiance of my Order Directing the Parties to Brief the Issue of Federal Sovereign Immunity would warrant dismissal of the Complaint on grounds of abandonment. 28 C.F.R. § 68.37(b)(1) (1999).

II. BACKGROUND AND PROCEDURAL HISTORY

On June 20, 1999, Complainant filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) alleging citizenship-status discrimination and retaliation on the part of Respondent arising out of Complainant's discharge from the United States Navy in January, 1998. Charge at 3; Compl. at 1. On August 3, 1999, OSC issued a determination letter in which it told Complainant that it "lacks jurisdiction to pursue [§ 1324b] claims against federal agencies, including the United States Navy." OSC Letter. On August 27, 1999, Complainant filed a pro se Complaint with the OCAHO alleging that Respondent had (1) discharged him because of his citizenship status, presumably in violation of 8 U.S.C. § 1324b(a)(1)(B); and (2) intimidated, threatened, coerced, or retaliated against him, presumably in violation of 8 U.S.C. § 1324b(a)(5). Compl. at 1.

On December 1, 1999, Respondent filed its Answer to the Complaint. Respondent's Answer did not raise the defense of federal sovereign immunity; however, in light of the Supreme Court's conclusion that sovereign immunity deprives courts of subject-matter jurisdiction with respect to actions brought against the United States as sovereign, FDIC v. Meyer, 510 U.S. 471, 475 (1994), I concluded that I must raise the issue *sua sponte*. Consequently, on December 29, 1999, I issued an Order Directing the Parties to Brief the Issue of Federal Sovereign Immunity.

On January 12, 2000, Respondent responded to my Order by submitting a photocopy of a Motion to Dismiss. Because Respondent had failed to file an original and two copies of this pleading as required by the OCAHO Rules, 28 C.F.R. § 68.6(a) (1999), Respondent's submission was not accepted for filing. On January 19, 2000, Respondent resubmitted its Motion to Dismiss in proper form, and I accepted the Motion as filed. On January 18, 2000, Complainant submitted to my office a document entitled "Refusal to Comply with Judge's Unlawful Order," in which he stated that he would not brief the issue of federal sovereign immunity.

Respondent's Motion to Dismiss sets forth two grounds for dismissal. First, Respondent argues that the Complaint fails to state a claim upon which relief can be granted because Complainant's OSC Charge was untimely filed. R.'s Mot. to Dismiss at 3. Second, Respondent argues that Complainant's claim is barred on the ground that the United States has not waived its federal sovereign immunity with respect to citizenship-status discrimination claims filed pursuant to 8 U.S.C. § 1324b. Id. at 3-4.

According to the certificate of service, Respondent's Motion to Dismiss was served by first-class mail on Complainant on January 18, 2000. Id. at 6. Under 28 C.F.R. § 68.11(b), Complainant had ten (10) days after the date of service to file his response to this motion. However, because the motion was served "by first class mail," and because Complainant had the right "to take some action within a prescribed period after the service" of these motions, 28 C.F.R. § 68.8(c)(2) provided Complainant an additional five (5) days in which to file his response. Therefore, Complainant had until February 2, 2000, to file his response to Respondent's Motion to Dismiss. Complainant has not filed a response and has not requested an extension of time in which to file.

III. STANDARDS GOVERNING MOTIONS TO DISMISS

Respondent has moved for dismissal based on both OCAHO's lack of subject-matter jurisdiction and the alleged failure of Complainant to state a claim upon which relief can be granted. I am bound to consider the motion regarding subject-matter jurisdiction first, since Respondent's motion to dismiss for failure to state a claim becomes moot if this court lacks subject-matter jurisdiction. See Bell v. Hood, 327 U.S. 678, 682 (1946); see also CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5A FEDERAL PRACTICE AND PROCEDURE § 1350, at 209-210 (1990). The standards governing motions to dismiss for lack of subject-matter jurisdiction are distinct from those governing motions to dismiss for failure to state a claim, and the two should not be conflated. See WRIGHT & MILLER, § 1350, at 89 (2d ed. Supp. 1998).

Respondent's invocation of federal sovereign immunity in its Motion to Dismiss constitutes a challenge to OCAHO's subject-matter jurisdiction. The OCAHO Rules of Practice and Procedure, 28 C.F.R. § 68, contain no specific provision authorizing motions to dismiss for lack of subject-matter jurisdiction. The Rules, however, provide that the Federal Rules of Civil Procedure (FED. R. CIV. P.) "may be used as a general guideline in any situation not provided for or controlled by [OCAHO] rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1 (1999). Thus, it is well established that FED. R. CIV. P. 12(h)(3), which compels dismissal of actions "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter," may be "used as a general guideline" when an OCAHO Administrative Law Judge (ALJ) has reason to question OCAHO's subject-matter jurisdiction. See, e.g., Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr., 8 OCAHO 1015, at 3 (1998), 1998 WL 1085948, at *2 (O.C.A.H.O.); Artioukhine v. Kurani, Inc. d/b/a Pizza Hut, 1998 WL 356926, *3-4 (O.C.A.H.O.); Boyd v. Sherling, 6 OCAHO 1113, 1119 (Ref. No. 916) (1997), 1997 WL 176910, *5 (O.C.A.H.O.); Caspi v. Trigild Corp., 6 OCAHO 957, 960 (Ref. No. 907) (1997), 1997 WL 131354, * 2-3 (O.C.A.H.O.).[1]

The U.S. Courts of Appeals apply different standards of review to "facial" motions to dismiss for lack of subject-matter jurisdiction–i.e., motions attacking the plaintiff's failure to invoke the court's jurisdiction in the complaint, but not challenging the court's legitimate authority to adjudicate the dispute–and "factual" or "speaking" motions to dismiss for lack of subject-matter jurisdiction–i.e., motions alleging that the court lacks subject-matter jurisdiction in fact, despite the formal sufficiency of the allegations made in the complaint. See Scarfo v. Ginsberg, DBG 94,175 F.3d 957, 960-61 (11th Cir. 1999); Lawrence v. Dunbar, 919 F.2d 1525, 1528-29 (11th Cir. 1990); Thornhill Publishing Co. v. General Tel. & Electronics Corp., 594 F.2d 730, 733 (9th Cir. 1979). In essence, a "facial" motion to dismiss alleges a mere defect in pleading that can be cured if the non-moving party makes appropriate amendments to the complaint. A "factual" or "speaking" motion to dismiss, by contrast, alleges an incurable jurisdictional defect that deprives the court of any authority to adjudicate the dispute.

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[1] Citations to OCAHO precedents in bound Volumes I and II, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practice Laws of the United States, reflect consecutive decision and order reprints within those bound volumes. Citations to OCAHO precedents in bound Volumes III-VII, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States, reflect consecutive decision and order reprints within those bound volumes. For OCAHO precedents appearing in bound volumes, pinpoint citations refer to specific pages in those volumes; however, pinpoint citations to OCAHO precedents in as yet unbound Volumes are to pages within the original issuances. Decisions that appear in Volumes I-VII will be cited to the page in that bound publication on which they first appear; the OCAHO reference number, by which all as yet unbound decisions are cited, also will be noted parenthetically for Volume I-VII decisions. Unbound decisions that have only been published on Westlaw shall be identified by Westlaw reference number.

Respondent's attack on OCAHO's subject-matter jurisdiction in this case is "factual" in nature; that is, it challenges this court's subject-matter jurisdiction in fact, without regard to the formal sufficiency of the allegations made in the Complaint. Under dominant federal law, when a trial court reviews a complaint under a factual attack with respect to the court's subject-matter jurisdiction, the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Scarfo,175 F.3d at 961 (quoting Lawrence, 919 F.2d at 1529); see also Thornhill Publishing, 594 F.2d at 733. Moreover, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Scarfo,175 F.3d at 961 (quoting Lawrence, 919 F.2d at 1529); Thornhill Publishing, 594 F.2d at 733 (quoting Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977)).

IV. ANALYSIS

A. FEDERAL SOVEREIGN IMMUNITY

Respondent's Motion to Dismiss argues that the Complaint should be dismissed because, in the absence of congressional waiver, the United States is shielded from liability under the doctrine of federal sovereign immunity. R.'s Mot. to Dismiss at 4. Respondent further argues that Congress did not waive federal sovereign immunity when it enacted 8 U.S.C. § 1324b. Id. As previously stated, this is a "factual" challenge to OCAHO's subject-matter jurisdiction, in that it alleges that OCAHO lacks jurisdiction in fact to adjudicate the present dispute, regardless of the sufficiency of the jurisdictional allegations made in the Complaint. Consequently, according to authoritative precedents governing "factual" challenges of this sort, I need not presume the truthfulness of Complainant's allegations; rather, I am free to weigh the evidence and satisfy myself as to the existence of my power to hear the case, keeping in mind that Complainant bears the burden of proof with respect to jurisdiction. Applying these standards, I hereby GRANT Respondent's Motion to Dismiss on the ground that OCAHO lacks subject-matter jurisdiction over the Complaint. My rationale for this decision is set forth below.

1. The Basic Doctrine of Federal Sovereign Immunity

The U.S. Supreme Court holds that sovereign immunity shields the federal government and its agencies from suit. See Dep't of the Army v. Blue Fox, Inc., 119 S. Ct. 687, 690 (1999); FDIC v. Meyer, 510 U.S. 471, 475 (1994); Loeffler v. Frank, 486 U.S. 549, 554 (1988); United States v. Mitchell, 463 U.S. 206, 212 (1983). Moreover, federal sovereign immunity is a jurisdictional bar, Meyer, 510 U.S. at 475, that can be overcome only by an unequivocal statutory waiver. See United States Dep't of Energy v. Ohio, 503 U.S. 607, 615 (1992); United States v. Nordic Village, Inc., 503 U.S. 30, 33-34 (1992). In short, courts possess subject-matter jurisdiction over actions brought against the federal government only to the extent that Congress has created such jurisdiction by express statutory language. See United States v. Sherwood, 312 U.S. 584, 586 (1941) (holding that the "terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.").

To be valid, a congressional waiver of federal sovereign immunity must appear in the text of the statute that purports to create the specific cause of action at issue; a court may not infer a waiver from the statute's legislative history or from other non-textual sources: "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report." See Nordic Village, 503 U.S. at 37; see also Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1991) (holding that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" (citations omitted)). Moreover, any statutory provision that purports to waive the federal government's sovereign immunity must be "construed strictly in favor of the sovereign ... and not 'enlarge[d] ... beyond what the [statutory] language requires.'" Nordic Village, 503 U.S. at 33 (internal citations omitted).

Finally, a court must determine whether a lawsuit in which the United States, or a branch or agency of the United States, is named as a respondent is in fact an action against the United States as sovereign. In this connection, the Supreme Court holds that "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" See Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101 n.11 (1984) (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)).

2. Federal Sovereign Immunity Under 8 U.S.C. § 1324b

Two of the U.S. Courts of Appeals have addressed the question of whether sovereign immunity shields the federal government and its agencies from suit under 8 U.S.C. § 1324b. See Hensel v. Office of the Chief Administrative Hearing Officer , 38 F.3d 505 (10th Cir. 1994); General Dynamics v. United States, 49 F.3d 1384 (9th Cir. 1995). Both courts hold that U.S. governmental entities are immune from suit under § 1324b because of the absence of any express waiver of federal sovereign immunity in the language of that provision.

In Hensel, Respondent the Oklahoma City Veterans Affairs Medical Center (VAMC) sought dismissal of the pro se Complainant's appeal on the ground of federal sovereign immunity. Hensel, 38 F.3d at 509. Citing Nordic Village and Dugan, the Hensel Court ordered that the claim against VAMC under IRCA be dismissed, stating that VAMC was a federal agency cloaked with immunity and that "[p]etitioner has not demonstrated that the IRCA contains explicit and unambiguous language that waives the immunity of the United States." Id.

In United States v. General Dynamics Corp., 3 OCAHO 1121 (Ref. No. 517) (1993), 1993 WL 403774 (O.C.A.H.O.), an OCAHO ALJ assumed that § 1324b(h) authorized OCAHO to award attorney's fees against the United States under appropriate circumstances. Id. at 1187-89, *43-44. On appeal, the United States challenged the ALJ's assumption that the United States could be sued for attorney's fees on the ground that the language of § 1324b(h) did not contain any express waiver of federal sovereign immunity. See General Dynamics v. United States, 49 F.3d at 1385. The government pointed out that § 1324b(h) merely authorized OCAHO to award attorney's fees to a "prevailing party, other than the United States," if the "losing party's argument is without reasonable

foundation in law or fact," 8 U.S.C. § 1324b(h) (1993). The government argued, successfully, that such language did not constitute an unequivocal waiver of federal sovereign immunity.

Ruling in favor of the government, the Ninth Circuit noted that the attorney's fee provisions of both Title VII of the Civil Rights Act and the Age Discrimination in Employment Act contained unequivocal waivers of federal sovereign immunity, but that analogous language was nowhere to be found in § 1324b(h). Id. at 1386. Citing United States Dep't of Energy v. Ohio and Nordic Village, the Ninth Circuit rejected the notion that ambiguity in the language of § 1324b(h) should weigh in favor of governmental liability: "[a] showing of ambiguity ... is insufficient to support a claim that Congress waived sovereign immunity." Id. Consequently, the court concluded that "the United States is immune from General Dynamics's claim for attorney's fees." Id. at 1387.

3. OCAHO Case Law

Although OCAHO previously embraced the notion that 8 U.S.C. § 1324b contained an implicit waiver of federal sovereign immunity, several recent OCAHO decisions have repudiated that interpretation and determined that the absence of an explicit congressional waiver of federal immunity in the language of § 1324b compels the dismissal of actions brought against the federal government.

In two early cases, one ALJ held that the "'underlying congressional policy'" of § 1324b compelled the conclusion that "Congress intended to and did waive sovereign immunity under 8 U.S.C. § 1324b." See Roginsky v. Dep't of Defense, 3 OCAHO 278, 283, 291 (Ref. No. 426) (1992), 1992 WL 535565, *4, *10 (O.C.A.H.O.) (quoting in part Franchise Tax Board of California v. United States Postal Service, 467 U.S. 512, 521 (1984)); Mir v. Federal Bureau of Prisons, 3 OCAHO 1073, 1074-83 (Ref. No. 510) (1993), 1993 WL 604446, *1-8 (O.C.A.H.O.). In coming to these conclusions, the ALJ found no express waiver in the language of § 1324b. Roginsky, 3 OCAHO at 287-88. Instead, the court found an implicit waiver by referring to (1) the legislative history underlying both §§ 1324a and 1324b of IRCA, id. at 288-89; (2) the fact that § 1324b was intended as a complement to Title VII, a statute which by its terms authorizes suits against both state and federal governments, id. at 289-90; and (3) the opinion of OSC, as derived from its enforcement strategies and an amicus brief. Id. at 290-91.

However, in the wake of the Tenth and Ninth Circuits' decisions in Hensel and General Dynamics, respectively, OCAHO ALJs have repudiated Roginsky and Mir. In a 1996 case, the Internal Revenue Service (IRS) filed a motion to dismiss in a § 1324b action on the ground that it was immune from suit under the doctrine of federal sovereign immunity. In granting the motion and dismissing the complaint, I concluded that, based on the relevant federal circuit case law, sovereign immunity barred the action against the IRS:

> I am unable to find the requisite explicit waiver of sovereign immunity in the language of 8 U.S.C. § 1324b. The Supreme Court case law ... clearly states that any waiver must be clear and unambiguous....

> Congress did not expressly include such a waiver in IRCA.... Considering the federal circuit court case law on the issue of waiver of sovereign immunity in IRCA, in the absence of a clear and explicit waiver, I conclude that 8 U.S.C. § 1324b does not contain a waiver of sovereign immunity.

See Kasathko v. IRS, 6 OCAHO 176, 183-84 (Ref. No. 840) (1996), 1996 WL 281945, *6 (O.C.A.H.O.). Moreover, in 1997 the same ALJ who had decided Roginsky and Mir implicitly repudiated those decisions when he held, in another action brought against the IRS, that "§ 1324b does not waive the federal government's sovereign immunity." See Kosatschkow v. Allen-Stevens Corp., 1997 WL 1051439, *16 (O.C.A.H.O.) (citing Hensel, 38 F.3d at 509).

4. Synthesis and Conclusion: Federal Sovereign Immunity in *Ping Ruan v. U.S. Navy*

Hensel, General Dynamics, Kasathko and Kosatschkow hold that the text of § 1324b contains no express statutory waiver of federal sovereign immunity. Without such a waiver, the federal government is not amenable to suit. Consequently, the Complaint in this case must be dismissed unless Complainant's action is not against the United States in its capacity as sovereign. As mentioned earlier in this Order, "a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" See Pennhurst State School & Hospital v. Halderman, 465 U.S. at 101 n.11 (quoting Dugan, 372 U.S. at 620). In this case, Complainant seeks back pay from Respondent. Compl. at 2. Moreover, because as a matter of logic back pay can only be awarded to one who has been reinstated to his prior position, I infer that Complainant also seeks reinstatement.

In Kasathko, I held that "[b]ack pay from the IRS would come from the Federal Treasury and therefore this case is a suit against the United States as sovereign." Kasathko, 6 OCAHO at 181-82, 1996 WL 281945, at *4 (O.C.A.H.O.). The present facts are indistinguishable from those in Kasathko. Back pay from the U.S. Navy would likewise "expend itself on the public treasury." Similarly, an Order directing Respondent to reinstate Complainant to his prior status as an active-duty serviceman would "compel [the government] to act." Consequently, Ping Ruan v. U.S. Navy is a suit against the United States as sovereign and I must dismiss the Complaint for lack of subject-matter jurisdiction.

B. COMPLAINANT'S FAILURE TO FILE A TIMELY CHARGE WITH OSC

In its Motion to Dismiss, Respondent argues that the Complaint should be dismissed on the ground that Complainant failed to file his Charge with the OSC within the 180-day filing period set forth at 8 U.S.C. § 1324b(d)(3). R.'s Mot. to Dismiss at 3. The 180-day deadline for filing an OSC charge is not jurisdictional, but is rather in the nature of a statute of limitations, subject to waiver, estoppel and equitable tolling. Horne v. Town of Hampstead, 6 OCAHO 941, 954-55 (Ref. No. 906)

(1997), 1997 WL 131346, *9-11 (O.C.A.H.O.). Therefore, Respondent's Motion to Dismiss on the ground that Complainant failed to file a timely Charge must be characterized as a Motion to Dismiss for Failure to State a Claim. See Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995). OCAHO Rules expressly authorize such motions, see 28 C.F.R. § 68.10 (1999); however, because the sovereign immunity of the United States deprives OCAHO of subject-matter jurisdiction over this action, I may not address Respondent's Motion to Dismiss for Failure to State a Claim, since to do so would be to assert jurisdiction with respect to that issue. See Bell v. Hood, 327 U.S. 678, 681 (1946).

C. ABANDONMENT OF THE COMPLAINT AND SANCTIONS

As mentioned previously, I issued an Order on December 29, 1999, directing the parties to brief the issue of federal sovereign immunity. Complainant flatly refused to follow that Order, and instead submitted a document entitled "Refusal to Comply with Judge's Unlawful Order."

28 C.F.R. § 68.37(b) provides in pertinent part that a complaint may be dismissed upon its abandonment by the party who filed it, and that a party shall be deemed to have abandoned a complaint if he or she fails to respond to orders by the ALJ. Moreover, OCAHO case law interpreting 28 C.F.R. § 68.37(b) demonstrates that "failure to respond to an order triggers a judgment of default, equivalent to dismissal of the [unresponsive party's] request for hearing...." United States v. Rodeo Night Club, 5 OCAHO 695, 697 (Ref. No. 812) (1995), 1995 WL 813236, *2 (O.C.A.H.O.); see also United States v. Hotel Valet, Inc., 6 OCAHO 252, 254 (Ref. No. 849) (1996), 1996 WL 312118, *2 (O.C.A.H.O.); Medina v. Bend-Pack, Inc., 5 OCAHO 569, 571 (Ref. No. 791) (1995), 1995 WL 706030, *2 (O.C.A.H.O.); Robinson v. New York State Family Court, 5 OCAHO 707, 710 (Ref. No. 814) (1995), 1995 WL 813233, *2 (O.C.A.H.O.).

In this case, Complainant intentionally defied my Order of December 29, 1999. In so doing, he has engaged in behavior covered by 28 C.F.R. § 68.37(b). Accordingly, even if sovereign immunity did not bar this action, I would find that Complainant's intentional refusal to respond to my Order of December 29, 1999, would justify the entry of judgment against him.

V. CONCLUSION

Because Respondent is shielded by the sovereign immunity of the United States, I conclude that OCAHO lacks subject-matter jurisdiction over this action Therefore, I grant Respondent's Motion to Dismiss with prejudice.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

NOTICE CONCERNING APPEAL

This is a final order. As provided by 8 U.S.C. § 1324b(i) and 28 C.F.R. § 68.57, not later than sixty (60) days after entry of a final order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2000, I have served the foregoing Order Granting Respondent's Motion to Dismiss on the following persons at the addresses shown, by first class mail, unless otherwise noted:

Ping Ruan
Job Corp.-Dorm R, 1672
P.O. Box 160070
Clearfield, UT 84016-0070
(Complainant)

Commander John A. Maksym, JAGC, USNR
Office of the Judge Advocate General
General Litigation Division (Code 34)
Washington Navy Yard
1322 Patterson Ave., S.E., Suite 3000
Washington, D.C. 20374-5066
(Counsel for Respondent)

John D. Trasviña
Special Counsel
Office of Special Counsel for Immigration-
Related Unfair Employment Practices
P.O. Box 27728
Washington, D.C. 20038-7728

Office of the Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2519
Falls Church, VA 22041
(hand delivered)

_____

Linda Hudecz
Paralegal Specialist to Robert L. Barton, Jr.
Administrative Law Judge
Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041
FAX NO.: (703) 305-1515